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Docket No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1987

CLIFTON J. HUMPHRIES,

Petitioner,

V.

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; CARGILL, INCORPORATED; AND COMMERCIAL UNION INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FOURTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals below committed error in deciding that petitioner, a Ship Foreman, claiming workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), did not meet the situs requirement of coverage for benefits under the Act, 33 U.S.C. § 903(a).

CERTIFICATE OF INTERESTED PERSONS AND PARTIES TO THE PROCEEDING BELOW

The undersigned counsel of record certifies that the following listed persons or parties have an interest in the outcome of the case and are parties of the proceeding below:

Clifton J. Humphries, the petitioner herein; his counsel, Sidney H. Kelsey, Jr., P.C.; Solicitor General, Department of Justice; the Director, Office of Workers' Compensation Programs, U.S. Department of Labor and its counsel, Joshua T. Gillelan, II, Esquire, Office of the Solicitor, U.S. Department of Labor; Cargill, Incorporated, the employer; and Commercial Union Insurance Company, the workers' compensation carrier and collectively, its attorney, Forest A. Nester, Esquire.

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No.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1987

Clifton J. Humphries,

Petitioner,

v.

Director, Office of Workers Compensation Programs, United States Department of Labor; Cargill, Incorporated; and Commercial Union Insurance Company,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF THE APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, CLIFTON J. HUMPHRIES, prays that a Writ of Certiorari issue to review the August 28, 1987 judgment and decision of the United States Court of Appeals for the Fourth Circuit, a rehearing of which was denied by the Court below on October 30, 1987.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals, Slip Op. No. 87-2508, published (4th Cir. 1987), affirmed a decision of the Benefits Review Board, United States Department of Labor (hereinafter "BRB") and is referred hereto as Appendix B. The Court of Appeals entered an order denying petitioner's petition for rehearing and suggestion for rehearing in banc on October 30, 1987, and is referred hereto as Appendix A.

The Decision and Order of the BRB reversing the Administrative Law Judge (hereinafter "ALJ") is referred hereto as Appendix C. The Decision and Order of the ALJ finding jurisdiction is referred hereto as Appendix D.

JURISDICTION

The order of the Court of Appeals denying a petition for rehearing and suggestion for rehearing *in banc* was entered on October 30, 1987, denying the petition. This Petition for a Writ of Certiorari was filed within 90 days of that date, 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the appeals court below was invoked under 33 U.S.C. § 921(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

33 U.S.C. § 902. *Definitions*

When used in this chapter -

. . .

(3) the term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship builder,

and ship breaker, . . . *

33 U.S.C. §903. Coverage

(a) . . . compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel) . . . *

STATEMENT OF THE CASE

This is a claim for workers' compensation benefits arising under the Longshore and Harbor-Workers Compensation Act (LHWCA), as amended, 33 U.S.C. § 901 et seq., hereinafter

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* The LHWCA as amended in 1984, amended §2(3) and §3(a) of the Act but did not affect the language or definitions related to the issue of jurisdiction in this case.

referred to as "the Act". Claimant, Clifton J. Humphries, was an employee at Cargill, Inc., Chesapeake, Virginia who held the position of Ship Foreman when he was injured on December 23, 1974, resulting in qualriplegia. Claimant Humphries filed for benefits under the Act and a formal hearing was held before the ALJ in Hampton, Virginia on August 22, 1985 which afforded all parties an opportunity to present testimonial and documentary evidence. On January 17, 1986, Frank J. Marcellino, the Administrative Law Judge, rendered a decision and order awarding claimant benefits under the Act and specifically held that claimant met the jurisdictional requirements under the Act as to both status and situs, 33 U.S.C. § 902(3) and 33 U.S.C.

§ 903(a) (App. D16-17)*. The employer, Cargill, appealed this decision and order to the BRB, and on December 15, 1986 the BRB reversed the ALJ's decision on jurisdiction and held that the situs requirement was not met and held that the claim was outside of the jurisidiction of the Act (App. C-16). The petitioner, Clifton J. Humphries, appealed the decision of the BRB to the United States Court of Appeals for the Fourth Circuit, invoking its jurisdiction under 33 U.S.C. § 921(c). On August 28, 1987, the Court of Appeals affirmed the decision of the BRB and held that the employee was not injured on a maritime situs (App. B14-16). The petitioner, Humphries, then petitioned for a rehearing and suggestion

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* Refers to Appendix to this Petition.

for rehearing in banc to the United States Court of Appeals for the Fourth Circuit upon the grounds that the opinion and decision of the Court of Appeals contained several material facts which were overlooked in the decision which facts were the basis upon which the decision was made and which decision in part conflicted with its own decision in Newport News Shipbuilding & Drydock v. Graham, 573 F.2d 167 (4th Cir. 1978). The United States Court of Appeals for the Fourth Circuit denied the petition for rehearing and suggestion for rehearing in banc on October 30, 1987 (App. A1-2).

STATEMENT OF THE FACTS

Clifton J. Humphries, an employee at Cargill for some 17 years, held the position as a Ship Foreman who worked out of the Cargill plant at the waterfront located on the Elizabeth

River in Chesapeake, Virginia. At the time of his injuries, claimant was a Ship Foreman who was also acting as a Shift Foreman on the second shift (4 p.m. to 12 midnight) on the day and night of the accident. As Ship Foreman, Humphries was in charge of the entire operation of Cargill at the time and supervised all of Cargill's maritime employees. His duties involved ship inspections and assignments and duties on the vessels berthed at the Cargill plant. On the day and night of petitioner's injury, December 23, 1974, Humphries and the Cargill maritime employees were actually loading a vessel berthed at the Cargill facility. The custom and direct orders of the employer, Cargill, required the Ship Foreman, Humphries, to leave the waterfront to obtain a meal for its ship inspector

working overtime so that the ship inspector could continue his duties onboard ship without having to take a meal break and thus shutting down the loading operation (App. D-5, 9-11).

As per company orders, Humphries departed the loading area in his vehicle to obtain a meal for his ship inspector. He left the waterfront and the Cargill facility and made a right turn on Bainbridge Boulevard, traveling north to Veal's restaurant, which was located approximately one mile down Bainbridge Boulevard. Mr. Humphries went into Veal's restaurant, charged the meal for the grain inspector, the account of which was maintained by the employer Cargill, exited the restaurant and was struck by a third party automobile and was severely injured rendering him a qualriplegic. At the time of

petitioner's injury at Veal's, he was in charge of the entire grain-loading operation taking place at the plant by way of a walkie-talkie which he had on his person at the moment of injury. Humphries was not on a personal errand of any kind (App. D3-5, 9-11).

Veal's restaurant lay on the **west** side of Bainbridge Boulevard where all maritime facilities including Amoco, the Texaco Terminal and other maritime terminals existed. All were contiguous to each other and located on the Southern Branch of Elizabeth River. The restaurant was also located directly between and connecting two facilities of Cargill on Bainbridge Boulevard: the main waterfront plant out of which Humphries worked, and the Elizabeth River Terminal facilities where Cargill loaded peanuts, etc. On the west side

of Bainbridge Boulevard where Veal's restaurant lay, there existed maritime and industrial businesses utilizing the port operations in the vicinity west of Bainbridge Boulevard. Physically the restaurant was located only two-tenths of a mile to the waterfront or four hundred yards when measured by a straight line. The only egress and ingress by land to the Cargill facility as well as other maritime terminals was Bainbridge Boulevard. All land transportation serving not only Cargill but the other waterfront facilities utilized only Bainbridge Boulevard or rail. On the east side of Bainbridge Boulevard there did exist some residential area. By automobile, it only took a few minutes, round trip, to drive from the Cargill plant at the waterfront where petitioner worked

to Veal's restaurant and back. Veal's restaurant was also the only restaurant utilized by Cargill when it ordered its ship foreman to obtain a meal for its ship inspector working overtime. There were no meal facilities available at the Cargill plant and thus the necessary trip from the plant area to obtain this meal at a nearby restaurant which Humphries utilized within the range of his radio in order to continuously supervise the grain-loading operation (App. D11-16).

REASONS FOR GRANTING CERTIORARI

In affirming the judgment of the BRB denying the petitioner compensation pursuant to the LHWCA, the court of appeals has decided a question of federal law in conflict with past decisions of this Court and other courts of appeals. As aptly noted by the

appeals court below, this case "created new and intractable jurisdictional problems for maritime workers." (App. B-7). A decision by the Court in this case would bring about a much needed uniformity among the federal circuits in determinations as to where coverage under the LHWCA ends and coverage under an applicable state worker's compensation law begins.

Since this Court's decision in Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) (hereinafter Caputo), it has been clear that, pursuant to the 1972 Amendments to the LHWCA, an employee can recover compensation under the Act only if the employee is "engaged in maritime employment," 33 U.S.C. §902(3) (1970 ed., Supp. V) and if the employee was injured upon the "navigable waters of the United States,"

33 U.S.C. §903(a), which is defined in the Act to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." By the 1972 Amendments, Congress extended coverage to additional workers injured in accidents occurring in areas landward from the waters's edge while narrowing the coverage to apply only to those workers in such areas that are actually engaged in maritime employment.

This Court in Caputo emphasized that Congress desired a system of compensation which would provide compensation to longshoremen and other maritime workers which would not depend upon whether the worker happened to be on land or over water at the time

of his injury-producing accident. 432 U.S. at 250. It held that an expansive view of the coverage extended by the 1972 Amendments should be taken, as the Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." Id. at 268 (quoting Voris v. Eikel, 346 U.S. 328, 333 (1953)).

One of the claimants in Caputo was a member of a regular stevedoring gang. On the day of Caputo's injury, he went to the waterfront hiring hall where he was hired as a terminal laborer. Noting that his assignment could have been changed at any time, the Court observed that Caputo would clearly have been covered had he been unloading a vessel rather than loading a consignee's truck at the time of the

accident. The Court held that "to exclude him from the Act's coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate." 432 U.S. at 274. The Caputo court observed:

> We need not decide, however, whether the congressional desire for uniformity . . . entitles everyone performing a task such as Caputo's to benefits under the Act. It is clear, at a mininum, that when someone like Caputo performs such a task, he is to be covered. The Act focuses primarily on occupations--longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover "longshoremen," it had in mind persons whose employment is such that they

> spend at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity.

432 U.S. at 272-73 (emphasis added).

Although the Caputo decision deemphasized the importance of the situs requirement in a case in which the claimant's status as a longshoreman was clear, it did not set forth any guidelines as to the extent to which an "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel" may be expanded landward away from the water's edge to incorporate activities of maritime employees which occur away from their vessel. Since Caputo, Supreme Court decisions on this subject have merely reiterated the principles regarding "situs" as set forth in Caputo

and have focused instead on whether the claimants in those cases were engaged in maritime employment at the time of their injuries. See P.S. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979); Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985) (holding that a fixed offshore oil rig is physically analogous to a pier or wharf and clearly a covered situs).

The circuit courts of appeal have reached inconsistent conclusions as to the precise boundaries of the "navigable waters of the United States" situs requirement under Section 3(a) of the LHWCA. In Sea-Land Services, Inc. v. Director, OWCP, 540 F.2d 629 (3d Cir. 1976), the Third Circuit held that as long as the employment relationship with the maritime activities is maintained, the federal compensation

remedy is available regardless of the situs of the accident producing the injury. The Sea-land court found that the limits of federal coverage are not determined by a geographic relationship with the navigable waters of the United States, but by the location of the interface between the air, land and water modes of transportation. Id. at 638. Under this test, an employee engaged in maritime activity may be covered by the LHWCA even if his accident occurs "at some point remote from the pier." Id. see also Dravo Corp. v. Maxin, 545 F.2d 374 (3d Cir.) cert. denied, 435 U.S. 908 (1976) (where majority of work performed in structured steel shop was related to shipbuilding or ship repair, ship was "adjoining area" within Section 903(a) of the LHWCA even though shop was located

some 2,000 feet from navigable channel and separated from most of the shipbuilding facilities by city street).

In the Fifth Circuit, the Court of Appeals, while not eliminating entirely the situs requirement where the LHWCA's requirement was met, held that a situs may qualify as an "adjoining area" as long as it is "close to or in the vicinity of navigable waters, or in a neighboring area." Texports Stevedore Co. v. Winchester, 632 F.2d 504, 514 (5th Cir. 1980). The Winchester court found that an adjoining area's perimeter is defined by function and that such area need not be used exclusively for maritime purposes "so long as it is customarily used for significant maritime activity." Id. at 515. In Winchester, a gear room for repairing tools used by stevedores

in loading ships five blocks from the waterfront was found to be "not clearly outside the waterfront area customarily used by employers for gear rooms." Id. The Winchester court partially overruled an earlier decision in that circuit, Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir. 1970) where the court focused only on the clerical activities of the office in which the injury occurred without examining the maritime nature of the overall area where the office was located. In Winchester, the court also rejected the position that the presence or absence of nonmaritime buildings between the point of injury and the water is an absolute test for whether an injury is covered under the LHWCA.

The Ninth Circuit Court of Appeals in Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978) established a four-part test for determining whether or not a site is an "adjoining area" under 33 U.S.C. §903(a). The relevant factors include: (1) the particular suitability of the site for maritime uses; (2) whether the adjoining properties are devoted primarily to uses in maritime commerce; (3) the proximity of the site to the waterway; and (4) whether the site is as close to the waterway as is feasible, given all the circumstances.

Applying this test, the court in Motoviloff v. Director, Office of Worker's Compensation Programs, 692 F.2d 87 (9th Cir. 1982) held that a facility operated by a terminal company for refurbishing metal containers for

shipped cargo was not a "situs" within the meaning of the LHWCA because the refurbishment did not require a site particularly suited to maritime uses and the actual choice of the site was governed by factors of cost and transportation rather than its marine proximity. More recently, however, in Perkins v. Marine Terminals Corp., 673 F.2d 1097 (9th Cir. 1982), the Ninth Circuit ruled that an accident occurring approximately 1,700 feet landward of the controlled access gate to the army base docks at which a longshoreman, who was injured in an automobile accident while driving his personal vehicle home, was working was an "adjoining area" under 33 U.S.C. §903(a). The Perkins court followed the Sea-Land holding that the employer-employee relationship rather

than the situs of that relationship is significant for purposes of admiralty jurisdiction. Id. at 1101.

Although the First and Fourth Circuits have also considered this issue, neither has developed a test for determining whether a particular place of work meets the LHWCA's "situs" requirement. In Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d 264 (1st Cir. 1976), the court, in finding that Congress intended for "adjoining areas" to include not only areas as directly adjoining the berth of the specific vessel being unloaded but also places which are generally part of the same waterfront area, noted that "[t]he evil of the old Act was that it bifurcated coverage for essentially the same employment." Id. at 275. In the Fourth Circuit, the

Court in Newport News Shipbuilding & Drydock v. Graham, 573 F.2d 167 (4th Cir. 1978) held that a submarine shop and foundry was included in the "navigable waters of the United States" for purposes of the LHWCA since both were "integral parts of the shipyard" even though they are located 1,200 feet and 3,000 feet respectively from the water's edge and even though neither was devoted exclusively to ship-related work.

The decisions of the BRB in Alford v. MP Industries of Florida, 16 Ben. Rev. Bd. Serv. (M-B) 261 (1984) arising out the Fifth Circuit, illustrates the difficulties posed by the lack of a uniform standard for determining whether the LHWCA's situs requirement has been met in a given case. The claimant, employed to rig scaffolding

and move equipment inside a ship's tanks to facilitate the sandblasting and repainting of the tanks located at the Jackonville shipyard, was injured in an automobile accident on his way back to the shipyard from downtown Jacksonville, where he was sent by the employer to pick up equipment needed for the sandblasting and repainting. Although the employer frequently sent employees to pick up supplies downtown and the route was, therefore, an area customarily used by the employer in pursuit of its ship repair business, the Board found that the route was not converted into an "adjoining area." The Board concluded that "[a]lthough the area covered by Section 3(a) has broad limits, we cannot extend the concept of an 'adjoining area' to include the route through a downtown area of

a city to and from an independent wholesaler." Id. at 263. Although the claimant cited Caputo in contending that Congress intended to alleviate the problem of employees walking in and out of coverage under the LHWCA, the Board found that acceptance of the claimant's argument would, in effect, read the situs requirement out of the Act.

Although expansion of the navigable waters to include portions of a city's downtown may indeed be more liberally construing the term "adjoining" than Congress intended, it illustrates the difficulty in determining exactly how far from the water's edge a longshoreman may venture before he steps out of federal coverage and into state worker's compensation coverage. While the Third Circuit's decision in Sea-Land has

been criticized for reading the situs requirement out of the Act entirely, the Caputo decision comes close to doing the same in situations where an employee's status as a maritime worker is clearly shown. The uncertainty created as the result of varying tests for determining if the "situs" requirement has been met and the varying emphasis placed upon the requirement by decisions of the Supreme Court and the Circuit Courts of Appeal warrants a review of this issue by the Court in the instant case to determine exactly what the outermost boundaries of "navigable waters of the United States" may be. It is imperative that a more definite standard be set forth to ensure uniformity in workers' compensation coverage sought for maritime workers in various parts of the country under

the LHWCA.

The decisions of the Fourth Circuit Court of Appeals in the petitioner's case appear to be in direct conflict with the decision of this Court in Caputo and the decision of several other Circuit Courts. Claimant Humphries indisputably enjoys the status of a longshoreman in his usual occupation as a Ship Foreman for Cargill. He has worked for 17½ years for the respondent in a number of stevedoring capacities. At the time of his accident, the petitioner was also acting as a Shift Foreman in another's absence. Although it has been held that an employee need not be engaged in maritime activity at the precise moment of his injury, P.C. Pfeiffer Co. v. Ford, supra, 444 U.S. at 83 n.18; Stockman v. John T. Clark & Son of Boston,

Inc., supra, 539 F.2d at 274, claimant Humphries had been performing the duties of a Shift Foreman on the vessel berthed at the Cargill facility throughout the day of his accident and was clearly still performing those duties when he was injured. In accordance with company policy, custom and orders, Humphries was obtaining a meal on behalf of his employer for a grain inspector working on the vessel when another vehicle collided with his parked vehicle. He was equipped at the time with a radio within range to continue supervising the loading of the vessel and to keep in constant contact with the personnel involved in this operation. The restaurant at which his vehicle was parked at the time of the accident is located only three-tenths or two-tenths of a mile from the waterfront

and squarely within the same maritime industrial area on the **west** side of Bainbridge Boulevard where the various terminal facilities are contiguous to each other. The restaurant was customarily utilized by Cargill in securing meals for its employees working overtime and an active charge account was maintained there for this purpose.

The Caputo court emphasized that the 1972 Amendments were intended to provide continuous coverage for maritime workers although they may, from time to time, step out the usual territorial bounds of the federal Act's coverage. Since, in the instant case, as in Caputo, there is not question as to the status of Humphries as a longshoreman or that he was engaged in activity directly related to this status, coverage should be afforded him under the LHWCA

regardless of whether Veal's restaurant would ordinarily qualify as an "adjoining area."

The appeals court in this case below, while acknowledging that there is "no single convincing test for determining just where the geographical boundaries of coverage under the LHWCA lie," (App. B-9), offered no test for petitioner and other maritime workers to follow except "a difficult exercise in line drawing." (App. B-10). Moreover, its past decisions offered no comprehensive test for such a determination on "situs" (App. B11-12).

The Winchester court found that an adjoining area need not be used exclusively for maritime purposes and that the nature of activities in the overall area rather than in the precise place where the injury occurred should

be examined in determining if that place satisfies the situs requirement of 33 U.S.C. §903(a).

Finally, the court of appeals decision was based on patent mistakes of fact in evidence: Veal's restaurant **was** along Bainbridge Boulevard which **did** connect two facilities of Cargill and **did** traverse continuous and contiguous terminal areas on the **west** side, and the restaurant was **not** separated from the nearest maritime terminal by a residential neighborhood (which was **east** of the Boulevard) (App. B14-15). This was the grounds upon which the petition for rehearing was requested but denied (App. A1-2).

While Veal's restaurant itself may not be used primarily for maritime purposes and adjacent areas may also be used for other purposes, clearly

the overall area surrounding its location is one principally devoted to maritime activity and any liberal construction of the situs requirement should lead to a conclusion that the restaurant is an "adjoining area" of the nation's navigable waters for purposes of the LHWCA.

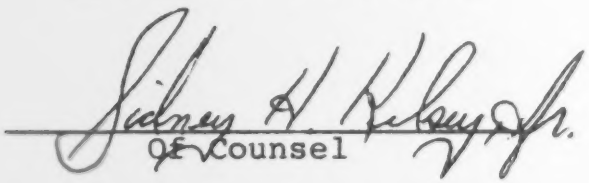
CONCLUSION

For the foregoing reasons, it is apparent that the Fourth Circuit Court of Appeals' decision in this case conflicts with the Supreme Court's decision in Caputo as well as with decisions of other circuit courts of appeal which have exercised liberality in construing the situs requirement of the LHWCA in cases in which the employee's status as a maritime worker were clear. A definitive decision in this case at this time would ensure

uniformity in the application of the LHWCA in the various circuits, thereby limiting future ligitation on the issue. Accordingly, the petitioner requests this Court to grant his Petition for a Writ of Certiorari to the Fourth Circuit Court of Appeals.

Respectfully submitted,

CLIFTON J. HUMPHRIES

BY: 
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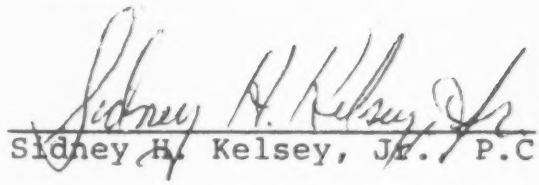
CERTIFICATE OF SERVICE

I certify that on the 28th day of January, 1988, forty (40) copies of the foregoing Petition for Writ of Certiorari were transmitted to the Clerk, Supreme Court of the United States and three (3) copies thereof were mailed to each of the following: Solicitor General, Department of Juctice, Washington, D.C. 20530; Mr. Lawrence W. Rogers, Director, Office of Workers' Compensation Programs, U.S. Department of Labor, Suite S-3524, NDOL, Washington, D.C. 20210; Joshua T. Gillelan, II, Esquire, Office of the Solicitor, U.S. Department of Labor, Suite N-2620, NDOL, Washington, D.C. 20210; Forest A. Nester, Esquire, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, 1111 19th Street, N.W., Washington, D.C. 20036, counsel for Cargill Inc., and Commercial

Union Insurance Company; and Clifton J. Humphries, 920 Kinglet Avenue, Chesapeake, Virginia 23324.



Sidney H. Kelsey, Jr., P.C.